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OSSE
Office of Dispute Resolution
March 30, 2023

Confidential

Parent on Behalf of Student, ¹	HEARING OFFICER'S DETERMINATION
Petitioner,	Hearing Dates: February 21, 2023 February 23, 2023 March 2, 2023 March 3, 2023 March 9, 2023 March 20, 2023
v.	Counsel for Each Party listed in Appendix A
District of Columbia Public Schools (Local Education Agency "LEA")	
Respondent.	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Case # 2022-0204	
Date Issued: March 30, 2023	

¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parent in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of Multiple Disabilities ("MD"), including Autism Spectrum Disorder ("ASD") and Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD").

Student's parent ("Petitioner") filed a due process complaint ("DPC") against DCPS on October 29, 2020, that resulted in a Hearing Officer's Determination ("HOD") issued on January 20, 2021, that found DCPS had denied Student a free appropriate public education ("FAPE"). When the DPC was filed, Student attended Student's neighborhood DCPS school ("School A").

Before issuance of the HOD, DCPS had agreed to place and fund Student at a non-public special education day school ("School B") and authorized Petitioner to obtain several independent evaluations ("IEEs"). The HOD ordered, inter alia, DCPS to convene an IEP meeting to review the IEEs and amend Student's individualized educational program ("IEP") to full-time special education services in a special school setting, provision for behavioral support services ("BSS") as well as other related services as determined needed by the IEP team.

Student began attending School B after the winter break of school year ("SY") 2020-2021. Student's attendance at School A was sporadic during SY 2020-2021 and SY 2021-2022. Since the start of SY 2022-2023, Student has attended school for only one day. Petitioner filed the current DPC on November 22, 2022. Petitioner asserts, inter alia, that DCPS has denied Student a FAPE by failing to place Student in a residential program for SY 2022-2023.

Petitioner seeks an order directing DCPS to place and fund Student in a residential treatment program and to conduct or arrange for funding of a psychiatric evaluation of Student to be completed in Student's home. Should Student not be placed in a residential program, Petitioner requests that DCPS be ordered to revise Student's IEP to include additional services such as private transportation, extended time, and/or additional transportation assistance such as the provision of a dedicated aide or behavior technician for the morning commute. Petitioner also seeks compensatory education for denials of FAPE that occurred and the right to request additional compensatory education pending the completion of the additional evaluations requested.

DCPS's Response to the Complaint:

DCPS filed a timely response to the complaint on December 1, 2022. In its response, DCPS stated, inter alia, the following:

Petitioner requests as relief that DCPS place and fund Student at a residential treatment program, conduct or arrange to fund a psychiatric evaluation to be completed in the home, additional alternative services such as private transportation, extended time, and/or additional transportation assistance such as a dedicated aide or behavior technician for the morning commute [though the complaint does not indicate where the travel or services would be to or provided in], compensatory education, reservation of additional compensatory education pending evaluations, meetings scheduled through parent's counsel, attorney's fees, any other relief just and reasonable.

Student was formally evaluated and assessed with a comprehensive psychological in October 2019, which included data and information regarding Student's school and work avoidance. The agency considered and analyzed this behavior for evaluation and programming purposes. At the time, Student was attending a DCPS middle school. Student's IEP provided only 15 hours of specialized instruction. Additional assessments and evaluations were conducted through February 2020, and the IEP was amended.

Petitioner filed a due process complaint in October 2020. An HOD was issued in January 2021, which included what the Hearing Officer determined was appropriate for formal evaluation and awarded compensatory education.

In mid-September 2021, Student was reported as having missed 13 school days. Student's evaluation reports were reviewed and considered for Student's IEP, and it was amended to add 240 minutes of BSS. BSS and the BSS-related goals were added to the IEP to address work avoidance, school avoidance, and a recognized pattern of avoidant behavior, including student complaints of physical symptoms to be dismissed or excused from work expectations.

A second attendance concern was documented when Student had 44 school days missed by November 19, 2021. On this date in the school year, there had been approximately 54 school days. Student presented for ■■■ needed FAPE programming for approximately ten school days by Thanksgiving 2021. Attendance concerns, monitoring, and programming support were maintained throughout the school year, including the addition of extended school year ("ESY") 2022. The attendance issues have continued. DCPS has programmed and supported Student's behavior needs in this regard, but Student is not being presented to address them for FAPE. Student does not require a residential placement to remedy attendance issues. The programming that has been proposed and made available to Student cannot be implemented due to truancy. DCPS has not violated IDEA, Student has not been denied a FAPE. The complaint must be dismissed.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on December 7, 2022. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on December 22, 2022, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on February 5, 2023. The parties were not available for the hearing dates offered by the IHO, and, as a result, a continuance was granted, extending the HOD due date to March 4, 2023. Two additional continuances were granted, and the HOD is now due on March 30, 2023.² The IHO conducted a pre-hearing conference and issued a pre-hearing order ("PHO") on February 2, 2023, and a revised PHO on February 3, 2023, outlining, inter alia, the issues to be adjudicated.

ISSUES:³

The issues adjudicated are:

1. Did DCPS deny Student FAPE by failing to provide Student with an appropriate IEP and/or placement and/or by refusing to place Student in a residential program for SY 2022-2023 considering Student's escalated behaviors and continued school refusals?⁴
2. Did DCPS deny Student a FAPE by failing to conduct updated evaluations to address Student's need for a more restrictive environment, such as a psychiatric evaluation in light of Student's ongoing and escalating attendance issues?⁵

DUE PROCESS HEARING:

The Due Process Hearing was convened on February 23, 2023, March 2, 2023, March 3, 2023, March 9, 2023, and March 20, 2023. The hearing was conducted via video teleconference on the Microsoft Teams platform. The parties submitted written closing arguments on March 24, 2023. Petitioner submitted a rebuttal closing argument on March 28, 2023.

² Petitioner was unavailable for the first scheduled day of the hearing, February 21, 2023. As a result, the hearing began on the third scheduled date, February 23, 2023. The hearing dates were continued to March 2 and 3, 2023. One of Respondent's witnesses was unavailable on those dates. Another continuance was granted, setting a March 20, 2023, hearing date, and extending the HOD due date to March 30, 2023.

³ The IHO restated the issues from the PHO at the outset of the due process hearing, and the parties agreed that these were the issues to be adjudicated.

⁴ Petitioner asserts: Student has become increasingly withdrawn and has refused to attend school for an extended period. Student's behaviors result from Student's disability, and because of these behaviors, Student cannot access education without a residential placement.

⁵ Petitioner asserts that due to Student's attendance issues and behaviors exhibited in the home, such as withdrawal and aggression, as well as DCPS's statement at meetings that it lacked sufficient data to consider placing Student in a more restrictive environment, DCPS should have initiated additional testing to access Student's need for a more restrictive placement.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 53 and Respondent's Exhibits 1 through 151) that were admitted into the record and are listed in Appendix 2.⁶ The witnesses testifying on behalf of each party are listed in Appendix B.⁷

SUMMARY OF DECISION:

Petitioner held the burden of production on both issues adjudicated and the burden of persuasion on issue #2. DCPS held the burden of persuasion on issue #1 after Petitioner presented a prima facie case.⁸ Based on the evidence adduced, the IHO concluded that DCPS sustained the burden of persuasion by a preponderance of the evidence on issue #1. Petitioner did not sustain the burden of persuasion on issue #2. The IHO dismissed Petitioner's claim as to issue #1 and #2 with prejudice. The IHO encourages Petitioner to complete the pending IEEs, provide them to DCPS, and if warranted, request DCPS convene a change of placement meeting to determine whether Student requires a more restrictive educational placement.

⁶ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and in Appendix A.

⁷ Petitioners presented four witnesses: (1) Student's mother (Petitioner), (2) a clinical psychologist who evaluated Student in August 2021, designated as an expert witness, (3) an educational advocate who also testified as an expert witness, and (4) an employee of the law firm representing Petitioner. Respondent presented five witnesses, all designated as expert witnesses: (1) the current DCPS School B placement monitor, (2) the former DCPS School B placement monitor, (3) a DCPS resolution specialist, (4) Student's School B social worker, and (5) an School B special education administrator/teacher. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

⁸ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 USC § 1415(f) and 20 USC § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement or the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement, provided that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

FINDINGS OF FACT:⁹

1. Student resides with Student's mother in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education and related services pursuant to IDEA with an MD disability classification, including ASD and OHI due to ADHD. (Respondent's Exhibit 121)
2. During SY 2019-2020, while Student was attending School A, Student's neighborhood DCPS school, DCPS conducted a comprehensive psychological evaluation of Student. In the October 25, 2019, evaluation report, the psychologist reported that Student's overall cognitive functioning fell in the extremely low range. Strengths were noted in visual-spatial skills. Weaknesses were noted in fluid reasoning skills. Student's academic functioning performance was in the below average to the extremely low range. Parents' and teachers' ratings on social-emotional functioning rating scales revealed significant behavioral and emotional concerns for Student in various areas of executive functioning and emotional regulation. The psychologist concluded that Student appeared to meet special education eligibility criteria under the OHI for ADHD and ASD classifications. On November 12, 2019, the eligibility team at School A determined that Student eligible for special education. (Respondent's Exhibit 41)
3. On November 18, 2019, DCPS convened an IEP meeting to develop Student's initial IEP. The IEP prescribed Student receive 15 hours per week of specialized instruction in math and reading outside of the general education setting. DCPS amended the IEP on March 6, 2020, to revise and update the post-secondary transition plan. (Respondent's Exhibit 41)
4. DCPS closed all schools on March 16, 2020, due to the COVID-19 pandemic and later resumed with distance learning. Student did not participate in distance learning and made no progress on Student's IEP goals during SY 2019-2020. Student received failing grades or incompletes in all courses for SY 2019-2020. Student received "F" grades for all core courses for the first term of SY 2020-2021, except in English, for which Student received a "C-". (Respondent's Exhibit 41)
5. Petitioner filed a DPC on October 29, 2020, asserting, inter alia, that DCPS had failed to provide Student with an appropriate IEP or placement. On December 15, 2020, before a hearing was convened on the DPC, DCPS convened an IEP review meeting. The IEP team increased Student's specialized instruction services to 32 hours per week outside general education. The IEP developed indicated that Student was performing 5 to 6 years below grade level in reading and math. On December 28, 2020, DCPS notified Petitioner that

⁹ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the IHO may only cite one exhibit.

School B had been identified as Student's location of service for the remainder of SY 2020-2021. (Respondent's Exhibit 41)

6. On January 4, 2021, DCPS issued funding authorization for Petitioner to obtain the following IEEs: comprehensive psychological, speech-language, occupational therapy ("OT"), assistive technology ("AT"), and functional behavior assessment ("FBA") (Respondent's Exhibit 41)
7. On January 11, 2021, a hearing was convened on Petitioner's October 29, 2020, DPC, resulting in an HOD issued on January 20, 2021. In the HOD, the Hearing Officer found DCPS denied Student a FAPE. He ordered, inter alia, that DCPS convene an IEP meeting with School B to review the IEEs that had been previously authorized, amend Student's IEP to full-time special education services in a special school setting, provide BSS as well as other related services that the IEP team determined were needed. In addition, the HOD awarded Student "100 hours of counseling to be provided by a qualified social worker or other counseling professional". (Respondent's Exhibit 41)
8. Petitioner has obtained two of the IEEs that DCPS authorized: an independent speech-language evaluation and an independent comprehensive psychological evaluation. The March 2021 speech-language evaluation revealed a severe mixed receptive/expressive language disorder. Specifically, the testing revealed impairments in the areas of semantics, syntax, and pragmatics, which negatively impact Student's comprehension and use of language. An IEP team reviewed this evaluation in June 2021, and the results were subsequently incorporated into Student's programming. (Petitioner's Exhibit 16)
9. An independent psychological evaluation was completed in August 2021, which found that Student's non-verbal skills, as assessed by the C-TONI, were higher than Student's verbal IQ scores. Student's FSIQ was below average (80). Student's academic achievement scores in reading fell within the very low range (2nd grade). Student's scores in math fell within the very low range (2.5 grade), and written expression scores were low (4.8 grade). The independent psychologist diagnosed the Student with ASD, anxiety, and depression, as well as ADHD. (Witness 1's testimony, Petitioner's Exhibit 17)
10. As part of the independent psychological, the BASC-3 was administered to address Student's behavior and social-emotional functioning and noted concerns in areas such as hyperactivity, depression, withdrawal, adaptability, social skills, functional communication, and interpersonal relationships. The evaluator noted that Student struggles with anxiety and depression, attention, and self-control. Because Student was diagnosed with autism as a teenager, Student missed many of the interventions that an earlier diagnosis would have availed. Student is now heavily entrenched in isolating and not interacting with others. Student's deficits in social skills and functional communication are clinically significant. (Witness 1's testimony, Petitioner's Exhibit 17)

11. Student began attending School B after the winter break during SY 2020-2021. On March 11, 2021, DCPS convened a 30-day review meeting at School B. At the time, Student had only attended School B in person once. However, Student attended school more using the virtual platform. The meeting notes document Student's reluctance to ride the school bus to School B due to being teased by other students at Student's previous school when Student rode a school bus. Petitioner's attorney asked about adding counseling to Student's IEP. School B indicated that Student was receiving group counseling. The DCPS placement monitor stated that no additional changes to the IEP would be considered until the IEEs that were authorized had been completed. The team discussed possible incentives to get Student to ride the school bus. School B staff agreed to address this directly with Student, hoping to convince Student to take the bus to school. (Petitioner's Exhibit 5)
12. During the March 11, 2021, meeting, Student's classroom teacher shared that overall, Student was doing a decent job in school. Student was performing at a higher rate than Student's peers on the two educational programs used in the classroom. Student's teacher noted that Student did not like whole group discussions but would respond in break-out rooms. The meeting notes also state that on the day Student came to school in person, there were just two students in the class: "Student was all smiles, cracking jokes and had a good day." The teacher commented that Student is very bright, articulate, and charismatic, but one must probe and pull to get Student to interact. Once that is achieved, Student can be very successful. Student had only participated in person for one day but was participating online at least three days per week which was a significant improvement at the time. Although Student earned passing final grades for SY 2020-2021, the grades were negatively impacted by Student's absences. (Petitioner's Exhibit 5, Respondent's Exhibits 89, 90)
13. School B staff informally assessed Student's academic performance when Student attended school in person, particularly as Student became more familiar with School B staff members. But when there were blocks of time that Student was absent from school, the staff found that they were starting all over again, building rapport with Student. (Witness 5's testimony)
14. On September 13, 2021, at Petitioner's request, DCPS amended and reissued the authorization letter for the compensatory counseling that the January 20, 2021, HOD had ordered. The amended letter allowed the services to be rendered by a licensed psychologist. (Respondent's Exhibit 80)
15. In November 2021, DCPS added a dedicated aide to Student's IEP. (Respondent's Exhibit 93)
16. Despite being provided bus transportation, Student's school attendance worsened each subsequent school year. School B sent Petitioner notifications of Student's unexcused absences. DCPS and School B held meetings to address Student's attendance and developed an attendance incentive plan for Student. (Respondent's Exhibits 68, 69, 70, 103, 104)

17. School B and DCPS convened meetings on September 10, 2021, November 8, 2021, December 20, 2021, and January 25, 2022, to discuss attendance concerns. School B agreed to conduct a home visit, add a dedicated aide, and refer Student for community interventions. None of these interventions have been successful or resulted in Student's school attendance. (Petitioner's Exhibits 7, 8, 9)
18. In SY 2021-2022, Student only attended 26 days and missed 110. Student failed all courses during SY 2021-2022. At School B, thirty unexcused absences result in a student not passing to the next grade. Consequently, because of Student's absences for the past two school years, Student has not been able to earn any credits and has failed all classes. Student has not been successful at School B because of non-attendance but not because of any other behavioral issues. (Witness 5's testimony, Petitioner's Exhibit 18, Respondent's Exhibits 94, 100, 119)
19. Student has become increasingly withdrawn, refusing to leave Student's bedroom, interact with family, or take care of personal health and hygiene. Student has become fixated on computer games to the point that when Student's mother disconnected the internet to encourage Student to attend school, Student became violent and threatened her and other family members. During the summer of 2022, Student was arrested after attacking Student's sibling in the home. Student's behaviors in the home have continued, and Student's school refusals have extended into SY 2022-2023. So far, Student has only attended one school day in the current school year. Despite School B staff conducting a home visit on or about September 27, 2022, efforts have been unsuccessful to sufficiently engage Student to attend school more than a single day. (Parent's testimony)
20. Student's mother describes Student as becoming angry and aggressive when she has attempted to get Student to attend school. In the morning, Student is often too sleepy from playing video games all night to go to school. Student's mother has tried taking Student's video games away or the television from Student's bedroom. That did not work to get Student to attend school. Student has pushed and threatened to hit Student's mother. She "walks on eggshells," not wanting Student to become aggressive. Student's mother does not try to make Student leave the house anymore. Student stays in Student's bedroom except to eat and shower. Student refused to go to the doctor and dentist even though Student's mother had made appointments. Student has not been aggressive lately, but Student still gets angry when confronted by anyone attempting to force a change in Student's current routine. Student's siblings visit the home weekly for Sunday dinner. Student has a rapport with Student's siblings, particularly Student's oldest sister. (Parent's testimony)
21. DCPS and School B convened a meeting at Petitioner's attorney's request on September 29, 2022, at which Petitioner requested that DCPS conduct or fund a psychiatric evaluation and/or place the student in a more restrictive environment, such as a residential facility. (Petitioner's Exhibit 10, Respondent's Exhibit 120)

22. On October 1, 2022, Petitioner and Student were engaged in a scuffle in the home. As a result, the District of Columbia Child and Family Services Agency ("CFSA") intervened. A meeting with CFSA was convened on October 25, 2022. Petitioner and her educational attorney participated remotely. Student did not participate as Student was sleeping, and Petitioner could not rouse Student. Student's father, who does not live in the home with Student, was absent from the meeting. However, Student's father communicated to a CFSA staff member his willingness to assist in disciplining Student, getting Student to attend school, and/or having Student live with him if the father could obtain housing assistance. The meeting notes indicate that at the time, Student had no outside counseling since 2020 because Student refused to attend. Parent counseling was offered to Petitioner, but she declined. Everyone at the meeting agreed that Student needed a more restrictive school environment. Petitioner's attorney agreed to file a DPC seeking a residential school placement. The team agreed to take action to see if a psychological evaluation could be done at Student's home. CFSA noted several organizations and agencies that could offer Student and Petitioner assistance. CFSA staff agreed to assist in securing those resources. However, to date, Student has yet to engage in counseling or assisted by any of the identified organizations. (Witness 2's testimony, Petitioner's Exhibit 11, 12)
23. DCPS convened Student's annual IEP review meeting on November 14, 2022. At the meeting, it was discussed that all Student's goals and services would be carried over from the previous IEP. The IEP developed noted the following regarding Student's behavior:
- "As reported by the parent, [Student] continues to exhibit aggressive and disruptive behaviors, which has impeded [Student's] academic progress. [Student] failed the 2021-2022 school year due to repeated school absences, lack of initiative, poor study habits, incomplete homework assignments, poor test scores, and incomplete classroom assignments. Due to [Student's] oppositional behavior and defiance, [Student] struggled to remain in [REDACTED] assigned area to receive classroom instruction. Also, once in the classroom, Student would be easily distracted and difficult to redirect to keep [Student] seated and on-task. So far, during the 2022-2023 school year, [Student] has only been present one day out of 31. Teachers report that [Student] exhibits great difficulty with adhering to the rules and behavior guidelines of the school. A behavior intervention plan, behavior support services, and a school-wide behavior level system are utilized to address these behaviors. [Student's] counselor has also made several home visits and delivered multiple attendance contracts to incentivize [Student's] presence in the school building. (Petitioner's Exhibit 14, Respondent's Exhibit 121)
24. Following the November 14, 2022, IEP meeting, DCPS issued a PWN that stated the following: "The team held an annual IEP meeting for [Student] on Monday, November 14, 2022. There were not any changes made to the IEP. The student has been extremely truant for most of the 21-22 school year and the 22-23 school year. The school has attempted to engage with the student and conduct home visits. The school will complete an OYE referral." (Respondent's Exhibit 130)

25. On November 22, 2022, Petitioner filed the current DPC. On November 23, 2022, DCPS authorized Petitioner to obtain an independent psychiatric evaluation. If additional funding is needed beyond the total hours or total cost authorized by DCPS for the psychiatric evaluation, Petitioner can request an increase of hours or total costs using the procedures outlined in DCPS's guide to independent services. (Witness 3's testimony, Witness 6's testimony, Respondent's Exhibit 120)
26. Student interacted appropriately with other students whenever Student attended School B. Student never exhibited violent behavior at School B. Although Student's School B social worker had reports from Student's parent of aggression and that Student was depressed, the social worker was able to make a diagnosis of depression, because she had not conducted any assessment of Student. However, she acknowledged that Student might exhibit different behaviors at home than at school. She noted that once when Student's grandmother visited Student's home from out of town, Student attended school because the grandmother would not let Student stay home from school. When asked about Student's possible need for residential placement, the social worker noted Student's attachment to Student's mother and the possibility that Student might experience feelings of abandonment with such a placement, which would perhaps be another trauma that would interfere with Student's ability to learn. (Witness 4's testimony)
27. Student's School B social worker recommended that a formal diagnostic psycho-social assessment be conducted to assess the complete picture of the social-emotional factors contributing to Student's school refusal. A social worker, psychologist, or psychiatrist could conduct such an assessment. (Witness 4's testimony)
28. The psychologist who evaluated Student in July 2021 noted that during her evaluation, Student's communicated that Student does not like school and wants to quit. Due to Student's school non-attendance, the evaluator expressed her opinion that at this point, the best situation for Student is placement in a residential treatment center. The fact that Student currently is not getting to School B, coupled with the noted violence in the home with police being called, raises significant concern for the evaluator about Student's safety and the safety of those around Student. Counseling would help address Student's anxiety and aggression. An evaluation such as an FBA and behavior intervention plan ("BIP") is desirable to proceed in addressing Student's school refusal. (Witness 1's testimony)
29. Petitioner also engaged the evaluator's firm to provide Student with the compensatory therapy services and to conduct the FBA that DCPS authorized following the previous HOD. The evaluator could not complete the FBA because of Student's school absences. Student was also resistant when counseling services were attempted in the home. The evaluator has not had any interaction with Student since the evaluation but had contact with Petitioner in attempting to provide the compensatory services. (Witness 1's testimony)
30. Petitioner has also been unable to secure the independent OT and AT evaluations because Student refused to participate in the evaluation process. These evaluations still need to be completed. Although DCPS authorized the psychiatric evaluation on November 23, 2022, Petitioner had yet to obtain a provider to conduct that evaluation

before the start of the due process hearing because the providers contacted were either unavailable or unwilling to conduct the evaluation. (Witness 3's testimony, Respondent's Exhibit 120)

31. At Petitioner's request, DCPS revised the authorization for counseling services under the January 2021 HOD, extended the time frame for the services to be rendered, and changed the 100 hours of services to 95 hours of Applied Behavior Analysis ("ABA") and 5 hours of counseling. Although compensatory services are generally not to be used during the school day, the ABA services that have been authorized can be used by Petitioner and Student in the home, particularly during mornings to assist Student in getting up, getting ready and being transported to school each day. (Witness 6's testimony, DCPS Exhibit 136)
32. Petitioner's educational advocate prepared a compensatory education plan designed to compensate Student for the alleged denials of FAPE in the current DPC. She has not talked with Petitioner directly and has yet to meet Student. The plan assumed that Student missed all instruction and related services in the current school year for a total of 392 hours of specialized instruction, counseling, and speech-language. The plan proposed the following compensatory services for the alleged loss: 200 hours of ABA, 200 hours of tutoring, 30 hours of speech-language, 50 hours mentoring, and extension of Student's use of these services for 1.5 years after Student is discharged from a residential placement presuming that will be ordered. In addition, she proposed that transportation to and from related service providers be awarded. (Witness 2's testimony, Petitioner's Exhibits 11, 12)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved;
and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5A DCMR 3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held the burden of persuasion on issue #2. The burden of persuasion fell to Respondent on issue #1 once Petitioners established a prima facie case on that issue.¹⁰ The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Did DCPS deny Student a FAPE by failing to provide Student with an appropriate IEP and/or placement and/or by refusing to place Student in a residential program for SY 2022-2023, considering Student's escalated behaviors and continued school refusals?

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that the IEP that DCPS developed for Student on November 14, 2022, was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. DCPS sustained the burden of persuasion regarding Student's alleged need for residential placement.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." Id. § 1401(26)(A).

"Under [the] IDEA and its implementing regulations, students with disabilities ... are entitled to receive [a] FAPE through an Individualized Education Program (or IEP)." *Charles H.*, 2021 WL

¹⁰ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement, provided that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

2946127 (quoting 20 U.S.C. § 1401(9)(D)). An IEP is a written document that lays out how the student will obtain measurable annual goals and that mandates specific special education and related services that the student must receive. 20 U.S.C. § 1414(d)(1)(A)(i). It is created for each student by a special "IEP Team," consisting of the child's parents, at least one regular-education teacher, at least one special-education teacher, and other specified educational experts. *Id.* § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles H.*, 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

The second substantive prong of the *Rowley* inquiry is whether the IEP developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances. In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated into the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits."

The key inquiry regarding an IEP's substantive adequacy is whether taking account of what the school knew or reasonably should have known of a student's needs at the time, the IEP offered was reasonably calculated to enable the specific student's progress...."Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. 988.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved

satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006)

"The IDEA requires that children with disabilities receive education in the regular classroom whenever possible" *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Endrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

Petitioner argues that Student has become increasingly withdrawn and has refused to attend school for an extended period, that Student's behaviors result from Student's disability, and because of these behaviors, Student cannot access education without a residential placement.

In the District of Columbia, to determine whether a residential placement is necessary, "a court must analyze 'whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.'" *McKenzie v. Smith*, 771 F. 2d 1527, 1534 (D.C. Cir. 1985) (quoting *Kruelle v. New Castle County School District*, 642 F.2d 687, 693(3d Cir. 1981).

In *Kruelle*, the Court stated: "Of course, before ordering residential placement, a court should weigh the mainstreaming policy embodied in the Education Act, which encourages placement of the child in the least restrictive environment. The district judge here, however, carefully undertook such a calculation. He noted that past attempts to provide in-home care and after-school instruction had been singularly unsuccessful; all had occasioned regression for Paul. And as the trial judge remarked in *DeWalt v. Burkholder*, No. 80-0014-A, 3 EHLR 551:500 (E.D. VA March 13, 1980), once a court concludes that residential placement is the only realistic option for learning improvement, the question of "least restrictive" environment is also resolved. "Only when alternatives exist must the court reach the issue of which is the least restrictive," 3 EHLR 551 at 553.

In *Leggett v. District of Columbia*, 793 F.3d 59, 71 (D.C. Cir 2015), the Court, while referencing *McKenzie (supra)*, also cited *Ashland School District v. Parents of Student R.J.*, 588 F.3d 1004, 1010 (9th Cir.2009) (although teachers reported that student had difficulty turning in assignments on time, she earned good grades when she completed her work, was well regarded by teachers, and was not disruptive, and it was student's "risky behaviors" outside of school that prompted her parents to enroll her in the facility). In other words, if a placement reasonably calculated to educate the child could be provided in a non-residential school, or if a parent sends her child to a residential program primarily to treat the child's emotional, social, or psychological issues, then the placement is not "necessary to provide a free appropriate public education."

The evidence demonstrates in the current case that Student began attending School B after winter break during SY 2020-2021. Student's consistent attendance at School B was challenging from the start. However, due to the Covid-19 pandemic, School B offered virtual and in-person instruction. Student's virtual attendance was more consistent than Student's in-person attendance.

Although Student had attendance challenges during the second semester of SY 2020-2021, Student participated in instruction, received passing grades, and demonstrated academic strengths relative to Student's School B peers. Student's school attendance became more problematic during SY

2021-2022. One reason cited for Student's attendance issues was Student's reluctance to ride a school bus to and from School B. Riding the school bus was to have been addressed with Student by School B staff. There is no evidence that any other transportation methods or alternatives were considered if this was, in fact, a significant factor in Student's non-attendance.

Student failed all classes in SY 2021-2022 and repeated the grade in SY 2022-2023. Student has attended School B for a single day in the current school year. Student has already surpassed the 30 unexcused absences that require Student to repeat the grade. Thus, Student has already lost two full school years of education that were otherwise made available.

Witnesses for both parties expressed concern that despite Student being eligible to continue to attend school until age 22, because Student is beyond the compulsory school attendance age and will soon reach the age of majority for educational purposes, Student is at significant risk of quitting school altogether. Student expressed to the psychologist who evaluated Student that Student does not want to attend school.

School B sent Petitioner notices of Student's mounting unexcused absences during SY 2021-2022 and convened meetings to address Student's non-attendance. School B designed incentives attempting to convince Student to attend school. There were also at least three home visits by School B staff, including Student's School B social worker, to assess Student's non-attendance and to convince Student to attend school. In two of the three visits, Student engaged with staff and committed to attending school, which Student did the next school day following one of the visits.

Student resides with Petitioner and a roommate in the household. Based upon Petitioner's testimony, as time has passed, Student has become more withdrawn and refuses to leave home. Student remains in Student's bedroom playing video games and only leaves the room to shower and eat. Because of Petitioner's fear of angering Student and the possibility of Student becoming aggressive, as Student has done in the past, Petitioner has given up on trying to get Student to leave the home at all, much less get Student up in the morning to ride a school bus to School B. Although School B continues to be paid by the District of Columbia to maintain Student's spot at School B, Student continues to not avail of that education. It is clear to the IHO that the current situation cannot persist. Based on the evidence, it is unclear whether any other methods short of a residential placement can or would make a difference in Student's school attendance. For instance, transportation changes have yet to be considered or proposed to address Student's reluctance to ride a school bus to School B.

Petitioner has been offered parental counseling which she refused. Student had been granted 100 hours of counseling available since January 2021. Although there has been one attempt by a provider to deliver those services, Petitioner has not availed herself of any of the resources offered. The organizations that CFSA identified have not been engaged to assist.

Petitioner presented a psychologist who testified as an expert and opined that Student's depression and anxiety are the causes of Student's isolation and school refusal. She opined that these conditions warrant a residential placement. However, despite having evaluated Student in August 2021, that witness has had no interaction with Student since the August 2021 evaluation. Student's School B social worker has provided Student behavior support services and engaged with Student

in Student's home during home visits. Consequently, the IHO gave greater weight to the social worker's expert testimony than that of Petitioner's expert witnesses.

The social worker testified that Student attended school when Student's grandmother visited from out of town and would not allow Student to remain home. This witness also testified that during a home visit, she and the other staff member who visited the home convinced Student to attend school the next day. The evidence demonstrates that Student's other parent believes he might be instrumental in ensuring Student's school attendance. However, Student does not reside with that parent. The evidence also demonstrates that Student's siblings visit the home weekly for Sunday dinner, and Student has a rapport with Student's siblings, particularly Student's oldest sister. There has been no exploration of whether Student can reside locally with another relative and attend school consistently as an alternative to Student being placed in a residential placement far away from relatives to whom Student seems to have close bonds.

In this instance, as distinguished from *Kruelle* (supra), there is no evidence of attempts to provide Student in-home instruction, for instance, or alternative forms of instruction delivery such as a combination of virtual and in-person instruction, or placement in another non-public school closer to Student's home; and there is no evidence that such efforts have proved or would prove unsuccessful. The evidence demonstrates that when Student attended School, even virtually, Student was engaged in instruction and displayed academic strengths. As was noted in *Ashland School District v. Parents of Student* (supra), if a placement reasonably calculated to educate the child could be provided in a non-residential school, then residential placement is not necessary to provide a FAPE.

Because alternatives to residential placement have not been tried and exhausted, the IHO must consider whether any placement short of residential placement is Student's least restrictive environment. Based upon the evidence presented, the IHO cannot conclude that residential placement is the only realistic option for Student to resume attending school and for Student's learning improvement.

Petitioner also asserts DCPS failed to make efforts to assess Student. However, DCPS authorized the psychiatric evaluation to resolve Petitioner's current DPC. Petitioner has yet to secure that evaluation. Granting an IEE authorization does not absolve DCPS of responsibility to evaluate Student; however, there is insufficient evidence that Petitioner made ample efforts to secure the evaluation following the authorization. As with the compensatory services and the other IEEs that DCPS authorized following Petitioner's previous DPC and HOD, the independent psychiatric evaluation authorization has yet to be used.

Student's School B social worker credibly testified that she could not diagnose Student with depression or determine whether Student's anxiety contributed to Student's non-attendance. She testified that a psycho-social evaluation of some type needs to be conducted first to determine if Student genuinely needs a residential placement or if some less restrictive measures could be instituted to reengage Student in learning and get Student to begin attending school.

The evidence demonstrates that at a meeting on September 29, 2022, Petitioner requested that DCPS either place Student in a residential placement or conduct an evaluation to determine Student's need for a more restrictive placement. Following an incident in the home between

Student and Petitioner and subsequent intervention by CFSA, Petitioner's attorney stated that she would file a DPC to seek a residential placement. Although DCPS did not immediately grant the request for an evaluation following the September 29, 2022, meeting, DCPS granted authorization to conduct the independent evaluation following the filing of the DPC.

DCPS' refusal to grant Petitioner's request at first blush was not unreasonable given that the other IEEs that had been authorized remained outstanding. DCPS immediately authorized the evaluation to resolve the DPC and to help determine whether Student needs a more restrictive setting. Without having the pending evaluations completed and considered by an IEP team, it would be hasty to move to the most restrictive alternative for Student in a residential placement, particularly in light of the School B social worker's testimony that Student may experience abandonment issues from a residential placement and the possibility that Student may experience additional trauma from such a placement that might affect Student's ability and willingness to engage in school at all. Unless and until that evaluation is completed either independently or by DCPS, and consideration change in placement to a more restrictive is made by an IEP team, Petitioner's claim in this regard is premature.

There is insufficient evidence from which the IHO can conclude that a residential placement is a response to Student's medical, social, or emotional problems that are not segregable from Student's learning process. Consequently, the IHO concludes that Respondent has met its burden of persuasion that, at least up until the development of Student IEP on November 14, 2022, the IEP and placement prescribed in a separate special education day school were reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

ISSUE 2: Did DCPS deny Student a FAPE by failing to conduct updated evaluations to address Student's need for a more restrictive environment, such as a psychiatric evaluation, in light of Student's ongoing and escalating attendance issues?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

34 C.F.R. § 300.303(a) makes it clear that "A local education agency ("LEA") *shall ensure* that a reevaluation of each child with a disability is conducted...if the child's parents or teacher requests a reevaluation." and that the reevaluation must be conducted at least once every three years.

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303].").

Pursuant to 34 C.F.R. § 300.304 (c), a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and

related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

Generally, when a child has been evaluated for special education eligibility, and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental, and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1–3); 34 C.F.R. §300.304(b)(1–3), (c)(4, 6).

Pursuant to § 300.305 (a) As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP Team and other qualified professionals, as appropriate, must— (1) Review existing evaluation data on the child, including— (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine— (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child; (ii) The present levels of academic achievement and related developmental needs of the child; (iii)(A) Whether the child needs special education and related services; or (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and (iv) Whether any additions or modifications to the special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2007).

Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254, 259, 261 (D.C.C. 2005).

An independent evaluation is one "conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i).

The IDEA regulations give parents a limited right to obtain an independent educational evaluation at public expense. The limited right arises only after the agency has procured an evaluation with which the parent "disagrees." 34 C.F.R. § 300.502(b)(1).

The regulations limit the parent to one independent evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees. *Id.* Once the parent expresses her disagreement, she may request an independent reevaluation at public expense, which the agency must either provide or file a due process complaint to establish that its evaluation is "appropriate." See 34 CFR § 300.502(b)(2). If the agency's evaluation is found to be appropriate, the parent may still obtain an independent evaluation at her own expense. 34 C.F.R. § 300.502(b)(3). See *South Kingstown School Committee v. Joanna S.*, 2014 WL 197859 (D.R.I. 2014).

Whether a school's actions under 34 C.F.R. § 300.502 constitute an "unnecessary delay" is an inquiry that must be addressed on a case-by-case basis. *J.P. ex rel., E.P. v. Ripon Unified School Dist.*, 2009 WL 1034993 (E.D. Cal. 2009) (citation omitted). The facts of each case are, therefore, critical.

The IDEA and its implementing regulations provide no additional guidance on what constitutes an "unnecessary delay." Though vague, this Court has interpreted the statute and regulations as requiring "prompt resolution of disputes involving the educational placement of learning-disabled children." *Herbin ex rel. Herbin v. Dist. of Columbia*, 362 F. Supp. 2d 254, 259-60 (D.D.C. 2005). But while such an undue delay constitutes a procedural violation of the IDEA, it does not "inexorably lead a court to find a child was denied FAPE." *Smith v. Dist. of Columbia*, No. 08-2216, 2010 U.S. Dist. LEXIS 125754, 2010 WL 4861757 (D.D.C. Nov. 30, 2010). Rather, the procedural violation must have affected the child's substantive rights. *Id.* "A delay does not affect substantive rights if the student's education would not have been different had there been no delay." *D.R. ex rel. Robinson v. Gov't of Dist. of Columbia*, 637 F. Supp. 2d 11, 18 (D.D.C. 2009). On the other hand, "[a] delay of more than 2-3 months is likely fatal to the [school] district's case, although the exact length will depend on the circumstances rather than being a bright-line test." Perry A. Zirkel, Independent Educational Evaluation Reimbursement Under the IDEA: An Update, 306 Educ. L. Rep. 32, 35 (2014). citing *Hill v. District of Columbia*, No. 14-cv-1893 (GMH), at *42 (D.D.C. Aug. 26, 2016)

An LEA's failure to conduct a comprehensive and appropriate evaluation of a student is a procedural violation of the IDEA. See, e.g., *I.T. ex rel. Renee T. v. Department of Educ.*, 2012 WL 3985686, 16 (D.Haw., Sept. 11, 2012). *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). As stated in the foregoing section, procedural violations may only be deemed a denial of FAPE if the procedural inadequacies— (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

Petitioner asserts that due to Student's attendance issues and behaviors exhibited in the home, such as withdrawal and aggression, as well as DCPS's statement at meetings that it lacked sufficient data to consider placing Student in a more restrictive placement, DCPS should have initiated additional testing to assess Student's need for a more restrictive placement.

The evidence demonstrates that before the September 29, 2022, meeting, there had been no request for or consideration of Student's possible need for a residential placement. At that meeting, Petitioner's counsel requested a residential placement or, in the alternative, that DCPS conduct or fund an evaluation to assist in determining Student's need for a more restrictive placement than School B.

The evidence demonstrates that a meeting with CFSA was held after an incident in the home between Student and Petitioner in October 2022. The participants did not include a representative from DCPS or School B. At that meeting, the participants agreed that Student needed a residential placement. Petitioner's attorney stated at that meeting that she would file a DPC to seek such a placement. The meeting participants also agreed to a litany of actions and resources to be employed to immediately address Student's in-home behaviors and school refusal. Except for filing the DPC, there is no evidence that any other actions were taken or resulted in any assistance to Student or Petitioner.

Although DCPS did not agree to the September 29, 2022, request for a change in placement or an evaluation, DCPS promptly provided Petitioner authorization for an independent psychiatric evaluation a day after the DPC was filed. Although that authorization was provided on November 23, 2022, as of the due process hearing in March 2023, that evaluation has yet to be conducted.

Although Petitioner asserts that DCPS should have, on its own accord, initiated some form of assessment to determine Student's need for a more restrictive setting, there was no suggestion or request for such an evaluation by anyone before the September 29, 2022, meeting and the October 25, 2022, meeting with CFSA. There is insufficient evidence that such an evaluation was warranted before Petitioner's request. Several independent evaluations had already been authorized and remained unconduted at the time of Petitioner's September 29, 2022, request. There was no evidence that Petitioner saw any urgency to obtain and consider those independent evaluations, including an FBA, that may have addressed Student's school refusal. Although an FBA is typically conducted to address in-school behavior, there is no evidence that an FBA could not have been used to address Student's school refusal. Particularly given that the IEE was also referred to the firm of the psychologist who conducted Student's 2021 psychological evaluation.

Although Petitioner asserts that DCPS should have initiated additional testing to assess Student's need for a more restrictive placement and should have done so before it authorized the IEE on November 23, 2022, the evidence does not support a conclusion that DCPS engaged in any unnecessary delay in not agreeing to the requested psychiatric or conducting an assessment of its own such that Student was denied a FAPE. Based upon the evidence presented, the IHO concludes that Petitioner did not sustain the burden of persuasion that DCPS impeded Student's right to a FAPE or significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student or caused a deprivation of educational benefit.

The IHO encourages Petitioner to obtain all outstanding independent evaluations that DCPS has authorized as soon as is practicable, to provide those evaluation reports to DCPS, and seek assistance from DCPS and/or School B, if needed, to complete those evaluations.

If warranted, the IHO encourages Petitioner to, as soon as is practicable, request that DCPS convene, with OSSE's participation, an IEP team meeting to consider any evaluations and data available to determine whether Student requires a more restrictive educational placement.

ORDER:

1. Petitioner's claim as to the inappropriateness of the IEP and placement that DCPS provided Student up to and including the development of Student's November 14, 2022, IEP, as well as any alleged refusal by DCPS to provide Student a residential placement before November 14, 2022, is hereby dismissed with prejudice and all relief requested by the Petitioner for this alleged violation is denied.¹¹
2. Petitioner's claim as to the DCPS's alleged failure to initiate additional testing to assess Student's need for a more restrictive placement up to and including the date of this HOD is dismissed with prejudice, and all relief requested by the Petitioner for this alleged violation is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.

Hearing Officer

Date: March 30, 2023

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¹¹ Petitioner is not barred from filing a DPC challenging the appropriateness of Student's IEP and/or placement or Student's need for a residential placement that may have been, or is, warranted following a reasonable period after Student's November 14, 2022, IEP was developed.